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IN RE: [illegible]

U.S. DEPARTMENT OF JUSTICE

WASHINGTON, D.C.

IN RE: [illegible] UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES DEPARTMENT OF JUSTICE

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 366

UNITED STATES OF AMERICA, PETITIONER

v.

JASPER WHITE

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE THIRD CIRCUIT*

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the circuit court of appeals is reported at 137 F. (2d) 24.

JURISDICTION

The judgment of the circuit court of appeals was entered on May 24, 1943 (R. 26), and petition for rehearing was denied on June 18, 1943. The petition for a writ of certiorari was filed on September 18, 1943, and was granted on November 8, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an officer of a labor union, who is in possession of union records demanded for production before a grand jury pursuant to a subpoena duces tecum addressed to the union, may refuse to produce those records on the ground that their production may tend to incriminate him.¹

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment of the Constitution provides in part:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *

The Fifth Amendment provides in part:

No person * * * shall be compelled in any criminal case to be a witness against himself * * *

¹ In our petition for certiorari herein, it was suggested, although without any charge of error, that the record presented a further question as to the jurisdiction of the court of appeals when the appeal was taken by filing a notice of appeal pursuant to the Criminal Appeals Rules rather than by application for appeal as required by Section 8 (c) of the Act of February 13, 1925. This question had first been raised by the Government in the court of appeals by a petition for rehearing (R. 26-31), which was denied without opinion (R. 31). However, at the contempt hearing, an extensive colloquy took place between the district judge and counsel (R. 11-14) with respect to the perfecting of the appeal, and it is our view that under the circumstances here presented the appeal should be considered to have been allowed within the meaning of the Act of February 13, 1925. Accordingly, this question is not noticed further in this brief.

STATEMENT

The District Court of the United States for the Middle District of Pennsylvania on December 28, 1942, issued its subpoena duces tecum directed to "Local #542, International Union of Operating Engineers," requiring the union to produce before the grand jury on January 11, 1943, copies of the constitution and by-laws of the union and specifically enumerated union records showing its collections of work permit fees, including the amounts paid therefor and the identity of the payors, from January 1, 1942, to the date of the issuance of the subpoena (R. 4, 5). The United States marshal served the subpoena duces tecum on John Mooney, the president of the union (R. 5). On January 11, 1943, respondent, Jasper White, appeared before the grand jury, acknowledged that he had the demanded documents in his possession, but, describing himself as "assistant supervisor" of the union, declined to produce them "upon the ground that they might tend to incriminate Local Union 542, International Union of Operating Engineers, myself as an officer thereof, or individually" (R. 2, 3). He reiterated his refusal to produce the records after consultation with counsel, even though asked by the prosecutor whether his position would be the same if he were assured that "the Union itself will not be a defendant * * *" (R. 3). On January 13, 1943, he was cited for contempt of court and

during the hearing reiterated his refusal to produce the records (R. 11). Respondent did not tender the records for inspection by the district judge in support of his assertion that their contents would tend to incriminate him or the union, but based his refusal to produce them on an opinion of his counsel that his claim of privilege was justified by the fact "that great uncertainty exists today as to what may or may not constitute a violation of Section 276 (b), Title 40, of the United States Code" (R. 2-3).²

The subpoena had been issued during the course of a grand jury investigation into alleged irregularities in connection with the construction of the Mechanicsburg Naval Supply Depot (R. 20). It was directed to the union and served on the union's president. Respondent, who was not shown to be the authorized custodian of the books but who

² This is the so-called "Kick-back Act" (Act of June 13, 1934, c. 482, 48 Stat. 948, 40 U. S. C. 276 (b)). Section 1 of this Act, which was the subject of construction in *United States v. Laudani*, October Term, 1943, No. 71, decided January 3, 1944, provides:

That whoever shall induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than \$5,000, or imprisoned not more than five years, or both.

nevertheless brought them into court (R. 2, 8), had not personally been subpoenaed to testify before the grand jury nor personally directed by the subpoena duces tecum to produce the union's records. There was neither effort nor indicated intention to examine him personally as a witness.

The district court held the refusal inexcusable, adjudged respondent guilty of a contempt of court (R. 11), and sentenced him to thirty days imprisonment (R. 12).³ The court below was divided in its reversal of that judgment. The majority held that the records of an unincorporated labor union⁴ were the property of all its members and that therefore, if respondent were a union member and if the books and records would have tended to incriminate him, he properly

³ Immediately after sentence the respondent was released pending appeal on his personal bond in the amount of \$100 (R. 14).

⁴ The record before the district court is silent as to whether the union was incorporated or unincorporated. Both the district court (R. 8) and the majority and minority of the court of appeals (R. 22, 24) treated the case as one involving an unincorporated union. This treatment seems factually correct in that in respondent's assignment of errors in the court of appeals the union is specifically referred to as a "voluntary unincorporated association" (R. 15). Accordingly, this brief accepts as a fact that the union was unincorporated. Of course, if the union were incorporated there would be no question but that the judgment below should be reversed on the authority of *Wilson v. United States*, 221 U. S. 361, and other like cases cited, *infra*, p. 12.

could refuse to produce them before the grand jury (R. 22). Accordingly, the court below remanded the case to the district court with directions to sustain the claim of privilege if after further inquiry it should determine that respondent was in fact a member of the union and that the books would tend to incriminate him as an individual (R. 22-23). The dissenting judge took the position that a labor union, even if unincorporated, is an organizational entity, functioning as such independently of its individual members, that consequently its records are not the property of its individual members, and that, since under *Boyd v. United States*, 116 U. S. 616, the privilege against self-incrimination cannot be asserted in respect of the books and papers of a third person, the refusal to produce them before the grand jury was not authorized by the Fifth Amendment (R. 25).

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

1. In holding that a member of a labor union who is in possession of books and records of the union may decline to produce such books and records pursuant to a subpoena duces tecum addressed to the union, on the ground that the production of such books and records may tend to incriminate him individually.

2. In reversing the judgment of the district court sentencing respondent for contempt of court, and in remanding the case to the district court

with instructions to sustain respondent's claim of privilege if the district court should find that respondent was a member of the union and that the subpoenaed books and records tended to incriminate him.

SUMMARY OF ARGUMENT

The court below held that the books and records of an unincorporated labor union are the private documents of the union members, and that for this reason a union member in possession of the books and records may decline to produce them in response to a subpoena directed to the union on the ground that their production may tend to incriminate him individually. In so holding, the court disregarded the attributes of distinct personality and of organizational entity which both the courts and the legislatures have in recent years recognized in labor unions. Labor unions are proper parties to litigation in their own right; they may sue and be sued and are liable to criminal prosecution. Their position as functioning legal entities is recognized in such legislation as the National Labor Relations Act, the Railway Labor Act, the Norris-LaGuardia Act and the War Labor Disputes Act, and in a great number of other statutes, both federal and state, which affect their rights and responsibilities. They are now accepted fully as juristic personalities, which for most practical purposes act upon and are acted upon by society without regard to the identity of their individual members.

The distinct juristic personality of labor unions in their relationship to their members is now, likewise generally accepted. A labor union functions internally as an organization in much the same way as a corporation. It normally operates under a constitution and by-laws, and acts through duly elected officers, who represent it in its relations with the public, keep official records, and in general discharge their duties just as do corporate officers. Union members are not subject to either criminal or civil liability for the acts of the union as such, in the absence of proof that they have personally authorized or participated in the acts in question. Union members may sue and be sued by their unions. A union may maintain an action for libel even though the libel did not reflect upon or tend to injure the reputations of the individual members. In the most vital and relevant respects union membership differs from membership in a partnership; union members generally do not have the right to select their fellow members, as do members of partnerships, and may not be expelled from their unions so long as they meet the union membership requirements.

The decision of the court below not only failed to give due weight to the actual characteristics of unions as functioning legal entities, but also was inconsistent with all other judicial decisions which have dealt with the same or similar questions. The question here involved was decided

adversely to the contentions of the respondent by the Circuit Court of Appeals for the Eighth Circuit in *United Mine Workers of America v. Coronado Coal Co.*, 258 Fed. 829, 834 (C. G. A. 8, 1919), and the decision of that court was apparently affirmed *sub silentio* by this Court on writ of error (259 U. S. 344). The same result has been reached in all other cases in which the question has been presented, both in relation to labor unions and in relation to other types of unincorporated associations. No case has been cited, and we know of none, in which the privilege here claimed has ever been sustained in circumstances like those here presented.

Furthermore, the reasoning of this Court in such cases as *Hale v. Henkel*, 201 U. S. 43, and *Wilson v. United States*, 221 U. S. 361, which denied the privilege with respect to corporate books, applies with equal force to the books of unincorporated labor unions. Although those cases relied to some extent upon the visitatorial power of government over artificial entities of its own creation, they in fact involved the right of the federal government to subpoena the records of state corporations, over which it was conceded that the federal government had no general visitatorial power. The reasoning which has led to denial of the privilege in respect of corporate records should equally preclude an unincorporated labor union suspected of violation of federal law

from insulating its records from inspection by placing them temporarily, for all that appears, in the custody of a member who himself has reason to fear prosecution.

ARGUMENT

THE RESPONDENT POSSESSED NO CONSTITUTIONAL RIGHT TO DECLINE TO PRODUCE THE BOOKS AND RECORDS OF THE UNION, REGARDLESS OF WHETHER THEY MIGHT TEND TO INCRIMINATE THE UNION OR HIM INDIVIDUALLY

Both before the grand jury and before the district court the respondent asserted a privilege to decline to produce the union's records not only on the ground that they might tend to incriminate him, individually and as an officer of the union, but also on the ground that they might tend to incriminate the union (R. 3, 11). Both grounds of privilege were likewise asserted in the assignment of errors filed by the respondent in the circuit court of appeals (R. 15).

The circuit court of appeals, however, in its opinion stated the question before it as a single one: "Can the defendant refuse to produce the records of the union on the ground that they will incriminate him?" (R. 21).⁵ By its judgment

⁵ The dissenting judge, on the contrary, posed and answered two questions: "(1) May the defendant refuse to produce the records of the union on the ground that they will incriminate him; and (2) May he refuse on the ground that their production by him will incriminate the union or its members?" (R. 23).

Both the majority and minority opinions properly recognized (R. 21-22, 23) that no question was presented as to

the court remanded the case to the district court with directions to determine whether the respondent was a member of the union, and, if he was, to examine the books to determine whether they tended to incriminate him as an individual. Whether they tended to incriminate the union or other members was plainly regarded as irrelevant. The court therefore appears to have decided that the tendency, if any, of the records to incriminate the union or its members other than the respondent gave rise to no privilege which the respondent could assert.⁹

The decision of the court below thus involves no holding that a union as such is governed by any rule different from that applicable to corporations—as to which the law is clear that a whether the records subpoenaed “contained disclosures so related to his personal acts as to make them virtually his own,” or concerned only his “private or personal” affairs. See 8 Wignore on *Evidence*, 3d ed., pp. 346-347. No claim to this effect was made, and the nature of the documents subpoenaed negatives the possibility that any such claim could properly have been made.

⁹ Possibly the premise of the court's conclusion in this respect was the doctrine that the privilege against self-incrimination is personal and may not be asserted by one person on behalf of another. However, an unincorporated association no less than a corporation can speak only through individuals who represent it. Consequently a holding that the respondent, shown to be an official of the union and in possession of the subpoenaed records, could not assert a privilege on behalf of the union is equivalent to a holding that the union had no privilege.

subpoena duces tecum may not be resisted by an officer on the ground that the production of the subpoenaed records would tend to incriminate the corporation. *Hale v. Henkel*, 201 U. S. 43; *Wilson v. United States*, 221 U. S. 361; *Essgee Co. v. United States*, 262 U. S. 151. To this extent the decision appears clearly correct. But we submit that the reasoning which places unincorporated associations such as labor unions in the same category as corporations for the purpose of denying them any privilege against self-incrimination should logically place the officials of such unincorporated associations in the same category as corporate officers. The latter may not resist the production of corporate books in response to subpoena even though such books may tend to incriminate them as individuals. *Wilson v. United States*, 221 U. S. 361; *Dreier v. United States*, 221 U. S. 394; *Wheeler v. United States*, 226 U. S. 478; *Essgee Co. v. United States*, 262 U. S. 151.

The court below upheld the privilege claimed by the respondent for himself as an individual, provided he was a member of the union. The books and records, although held to be those of the union, and not the private books and records of the respondent alone—so that they did not fall

The rule as to corporate officers is the same even though the officer be the sole stockholder of the corporation. *Grant v. United States*, 227 U. S. 74; *United States v. Hoyt*, 53 F. (2d) 881 (S. D. N. Y. 1931).

within the rule of *Boyd v. United States*, 116 U. S. 616—were nevertheless held to be the private documents of the union members, as distinguished from the union, so that each member could assert in respect of them his own personal privilege against self-incrimination (R. 21, 22). In so holding, the court necessarily concluded that an unincorporated labor organization has no legally recognizable personality apart from its individual members. This conclusion is, we submit, not only unrealistic but also inconsistent with the recognition of union status and personality which pervades modern legislation and judicial thinking in labor matters.

Doubtless in the early days of the republic labor organizations were generally regarded as no more than the aggregate of their members. If they existed at all, they were treated as unlawful conspiracies rather than distinct personalities with privileges and responsibilities cognizable by law. See *The Case of the Philadelphia Cordwainers* (1806), the best report of which appears in 3 Commons & Gilmore, *Documentary History of American Industrial Society*, 59-248 (1910); *The Pittsburgh Cordwainers Case* (1815), 4 Commons & Gilmore, *op. cit.*, 15; 1 Teller, *Labor Disputes and Collective Bargaining*, sec. 60, pp. 150-152. Not until 1842 did the American courts clearly declare labor unions to be lawful. *Commonwealth v. Hunt*, 4 Met. (Mass.) 111 (1842);

see Landis, *Cases on Labor Law*, Historical Introduction, pp. 32-33.

The modern scene, however, is very different. Since the decision in the first *Coronado* case in 1922, *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344, it has been fully established that an unincorporated labor organization is a proper party to litigation and may sue and be sued. *Operative Plasterers', etc., Ass'n v. Case*, 93 F. (2d) 56 (App. D. C. 1937); *Russell v. Central Labor Union*, 1 F. (2d) 412 (E. D. Ill. 1924); *In re Cleveland and Sandusky Brewing Co.*, 11 F. Supp. 198, 200 (N. D. Ohio 1935); *National Association of Insurance Agents v. Committee for Industrial Organization*, 25 F. Supp. 540 (D. C. 1938); *Green v. Gravatt*, 34 F. Supp. 832 (W. D. Pa. 1940). Even the liability of unincorporated labor unions to criminal prosecution is clear. *United States v. Greater N. Y. L. P. Chamber of Commerce*, 34 F. (2d) 967, 968 (S. D. N. Y. 1929), affirmed, 47 F. (2d) 156 (C. C. A. 2, 1931), certiorari denied, 283 U. S. 837; *United States v. International Fur Workers Union*, 100 F. (2d) 541 (C. C. A. 2, 1938), certiorari denied, 306 U. S. 653; *United States v. B. Goedde & Co.*, 40 F. Supp. 523, 528 (E. D. Ill. 1941); cf. *Brown v. United States*, 276 U. S. 134; *United States v. Local 807*, 315 U. S. 521, 529 et seq.; *United States v. American Medical Association*, 110 F. (2d) 703 (App. D. C. 1940), certiorari denied, 310 U. S. 644.

In many states the result of the *Coronado* case has been reached by statute;* in other states a variety of procedural devices has been invoked to enable unincorporated associations to appear in court.⁷ Rule 17 (b) of the Federal Rules of Civil Procedure provides for suit by or against any unincorporated association "in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States."⁸ Since the time of the *Coronado* case, unions have appeared in the courts on innumerable occasions as parties plaintiff or parties defendant in all kinds of actions. At times their presence has been challenged—though rarely with success;⁹ but for the most part their standing as litigants has been accorded the silence which accompanies the commonplace. See *General Committee, etc. v. Missouri-K-T. R. Co.*, 132 F. (2d) 91, 93 (C. C. A. 5, 1942), reversed on other grounds, October Term, 1943, No. 23, decided November 22, 1943.

*See Cole, *The Civil Suitability of Laws of Labor Unions* (1939), 8 Fordh. L. Rev. 29, 32-33, footnotes 17-19; Dangel & Shriver, *Labor Unions* (1940), § 458.

⁷See Note (1932) 5 So. Calif. L. Rev. 421-422, footnote 5.

⁸In *Maywood Farms Co. v. Milk Wagon Drivers' Union*, 316 Ill. App. 47, 43 N. E. (2d) 700 (1942), a union as well as its officers was held in contempt for violating an injunction running to the union. The court said: "The union is a juridical entity."

The personality of labor organizations has been similarly recognized in other areas. Thus, a labor union possesses a personality entitled to redress against a libel. *Kirkman v. Westchester Newspapers, Inc.*, 287 N. Y. 373, 380-381, 39 N. E. (2d) 919 (1942). An attorney representing a union is not the attorney of the individual union members. *Almon v. American Carloading Corp.*, 312 Ill. App. 225, 38 N. E. (2d) 362 (1941), noted (1942) 55 Harv. L. Rev. 1035, reversed on other grounds, 380 Ill. 524, 44 N. E. (2d) 592 (1942). There the analogy of labor unions to corporations, rejected in both the majority and minority opinions below (R. 22, 24), was accepted; the court said:

The personality of such an association is invisible. It is, however, given bodily appearance by the officials and others who act in its name. The same thing is true of a corporation. Through the officials the invisible becomes visible, and thereby associations such as these come to have local habitation and a name. (312 Ill. App., at p. 229.)

The recognition of labor unions as functioning legal entities is no less clearly discernible in modern legislation. In its opinion in the *Coronado* case this Court set out an impressive list of federal and state statutes recognizing labor unions

and, in the main, legislating in their behalf." More recently the National Labor Relations Act, 49 Stat. 449, 29 U. S. C. 151, the Railway Labor Act, 44 Stat. 577, 45 U. S. C. 151, and the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. 101, have given emphasis to the federal recognition of union personality as an essential factor in the design to eliminate the inequality of bargaining power between employees and their employers. See *Findings and Declaration of Policy* in Section 1 of the National Labor Relations Act, 29 U. S. C. 151. The Anti-Racketeering Act, 48 Stat. 909, 18 U. S. C. 420a-e, by its very exception in favor of labor organizations recognizes the existence of such organizations as entities capable of violating the Act. The War Labor Disputes Act, Public No. 89, 78th Cong., evidences similar recognition. Labor unions, we submit, are now accepted fully as juristic personalities, which for most practical purposes act upon and are acted upon by society without regard to the identity of their individual members.

And if unions are now recognized as distinct

¹ 259 U. S. 344, 386-389, footnote 1. The prevalence and multifariousness in recent years of legislation and other governmental action predicated on the existence of labor unions as such are so generally appreciated that it seems unnecessary to burden the text of this brief with more than a few prominent illustrations. However, for the convenience of the Court we set out in the appendix a compilation of federal and state action since 1922 affecting the rights and responsibilities of labor unions.

entities in their relationship to society as a whole, we submit that they are likewise distinct entities in their relationship to their members. The court below said (R. 22): "For the purposes of the privilege against self-incrimination the members of the union are in the same position as ordinary individuals who maintain books and records of their transactions." Herein, we believe, lies the fundamental error of the court.

There is no need to dispute the soundness of the view expressed both in the majority and the minority opinions, that the visitatorial power of the state over corporations derives at least in part from the original charter grant of corporate individuality, and that it differs in scope from such power of visitation as may exist with respect to unincorporated labor unions. Such difference as may there exist, however, is of less significance than the similarities of actual operation between the two types of organizations.¹² A labor union

¹² In *Hemphill v. Orloff*, 277 U. S. 537, in holding that a Massachusetts trust was a "corporation" within the meaning of a Michigan statute governing the right to maintain actions in the Michigan courts, this Court said, at p. 550: "Whether a given association is called a corporation, partnership, or trust, is not the essential factor in determining the powers of a state concerning it. The real nature of the organization must be considered. If clothed with the ordinary functions and attributes of a corporation, it is subject to similar treatment."

In *People v. Reynolds*, 250 Ill. 11, 182 N. E. 754 (1932), a subpoena duces tecum addressed to a union was served on the president, who appeared and pleaded the constitutional right

functions internally as an organization in much the same way as a corporation. Customarily, it has a constitution and by-laws, holds meetings, elects officers and committees, keeps official records, and in general acts by the same kind of organizational methods as are employed by a corporation.

We submit that it is highly unrealistic to hold, as did the court below, that for the purposes of the privilege the books and records of an unincorporated labor union are the property of the individual members, as distinguished from the union as an entity. The records of a labor union in the custody of an official of the union are as a practical matter no more the private papers of such official than the records of a corporation in the custody of an officer of the corporation are the private papers of such officer. The officers of the union guide its destinies, and act for it

of the union to protection against unreasonable searches and seizures under the Illinois constitution. No issue of personal privilege on the part of the president was raised. The court, although finding the particular subpoena invalid because of undue breadth, held the union amenable to any properly limited subpoena of its books and records, on the ground of its similarity to a corporation. The court said (350 Ill. at p. 15): "The plaintiff in error invokes this provision [against unreasonable searches and seizures] not for himself but in behalf of the moving picture operators' union of which he is the president. The union, it appears from the answer of the plaintiff in error, has a constitution, by-laws and officers and has exercised corporate powers. These facts show *prima facie* that the union is a corporation and therefore a creature of the State."

in a truly representative capacity. A criminal prosecution of a union and its officers does not bring in the members unless they are specifically made defendants,¹³ nor are the members of a union subject to injunction against the continuance of illegal activities by the union officials in the absence of a showing that the members have authorized or participated in such illegal activities. *Eagle Glass & Mfg. Co. v. Rowe*, 245 U. S. 275, 280. Service upon an officer or other representative of a union will bring the union within the jurisdiction of a court even though service upon a member as such will not.¹⁴ The responsibility of a union as such is a subject of inquiry separate and apart from the question of the responsibility of its members for illegal acts. *Toledo P. and W. R. R. v. Brotherhood of R. R. Trainmen*, 132 F. (2d) 265, 272 (C. C. A. 7, 1942), reversed on other grounds, October Term, 1943, No. 28, decided January 17, 1944. A union may maintain an action for libel even though the libel did not reflect upon

¹³ As a matter of consistent practice, in criminal prosecutions under the Sherman Act the union is made a defendant along with specifically named officers or members. E. g., *United States v. International Fur Workers Union*, 100 F. (2d) 541 (C. C. A. 2, 1938), certiorari denied, 306 U. S. 653; *United States v. Lumber Institute of Allegheny County*, 35 F. Supp. 191 (W. D. Pa. 1940).

¹⁴ *Operative Plasterers', etc., Ass'n v. Case*, 93 F. (2d) 56 (App. D. C., 1937); *Dean v. International Longshoremen's Ass'n*, 17 F. Supp. 748 (W. D. La., 1936); *Christian v. International Ass'n of Machinists*, 7 F. (2d) 481 (E. D. Ky., 1925).

or tend to injure the reputations of the individual members (*Kirkman v. Westchester Newspapers, Inc.*, 287 N. Y. 373, 39 N. E. (2d) 919 (1942)), and may even sue to enjoin its own members from unlawfully holding themselves out as acting by union authority. *Thomas v. International Seamen's Union of America*, 101 S. W. (2d) 328 (Tex. Civ. App. 1937). As the dissenting judge below pointed out (R. 24-25), union officers may be indicted for embezzlement of union funds (*People v. Herbert*, 295 N. Y. S. 251 (1937), *People ex rel. Murphy v. Crane*, 80 N. Y. S. 408 (1903)); members of unions generally do not have the right to select their fellow members (see *People v. Herbert, supra*); and members may not be expelled so long as they meet the union membership requirements (*Abdon v. Wallace*, 95 Ind. App. 604, 165 N. E. 68 (1929); *Sweetman v. Barrows*, 263 Mass. 349, 161 N. E. 272 (1928)). The partnership analogy implicitly followed by the court below is unsound.

Accordingly, we submit that the court below gave inadequate weight to the practical differentiation which the courts have recognized between the personalities of labor unions and the individual personalities of their members. In so doing, the court not only closed its eyes to the realities of the situation; it disregarded clear lines of judicial authority which we believe should have been accepted as controlling.

The very question now before the Court was presented in *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344. In that case the action was against an unincorporated national union, a number of unincorporated local unions, certain officers of these unions, certain individual members of the union, and others. By orders of the trial court directed to the union and to certain named officers numerous documents were required to be produced at the trial. The United Mine Workers, John P. White, individually and as president of the union, and William Green, individually and as secretary-treasurer of the union, moved to vacate the orders on the ground, among others, that:

such order of production would violate the constitutional rights of said defendants secured to them under Articles 4 and 5 of the Amendments to the Federal Constitution against unreasonable search and seizures, and compel them to give testimony against themselves in a cause penal in its nature. [Vol. 18 of the Records of this Court (October Term, 1921), p. 328.]

Motions to vacate were likewise made by twenty-four of the locals, on behalf of their members. All the motions were denied.

This claim of privilege under the Fourth and Fifth Amendments was pressed both in the circuit court of appeals and in this Court. It was rejected summarily by the circuit court of appeals

on the authority of *Hale v. Heikel*, 201 U. S. 43, *Wilson v. United States*, 221 U. S. 361, and *Wheeler v. United States*, 226 U. S. 478.¹⁵ In this Court five of the twenty-four assignments of error were devoted to the issue, and it was argued on both sides.¹⁶ While the issue was not mentioned in this Court's opinion, the opinion recited at length the evidence upon which the decision was based. Much of the evidence so noticed by the Court was derived from the documents in question, a circumstance which we believe shows by plain implication that this Court regarded the claim of privilege as being without merit.

The *Coronado* case arose under the Sherman Act, which specifically provided for suit against "corporations and associations" (15 U. S. C. 7, 8). While the terms of that Act, however, may have been relevant to the main issue resolved by the Court—i. e., the issue of the suability of the unions as such¹⁷—we submit that they have no bearing on the issue of privilege. That issue, if it exists, arises from the Constitution, not from

¹⁵ *United Mine Workers of America v. Coronado Coal Co.*, 258 Fed. 829, 834 (C. C. A. 8, 1919).

¹⁶ See the official report of the arguments, 259 U. S., at pp. 364, 375-376.

¹⁷ Even on the issue of the suability of the unions this Court based its decision primarily on an analysis of the nature, functions, privileges and responsibilities of unions generally, referring to Sections 7 and 8 of the Sherman Act only as giving confirmation to a conclusion already reached for other reasons. 259 U. S., at p. 392.

the statute authorizing the proceedings in which records are required to be produced. Accordingly, we submit that the *Coronado* case, although dealing with the issue *sub silentio*, constitutes authority of this Court in favor of our position on the question now presented.

Other cases in which the issue has been presented have likewise resulted in decisions denying the privilege. See *United States v. Greater N. Y. L. P. Chamber of Commerce*, 34 F. (2d) 967 (S. D. N. Y. 1929), affirmed as to other matters, 47 F. (2d) 156 (C. C. A. 2, 1931), certiorari denied, 283 U. S. 837; *United States v. B. Goedde & Co.*, 40 F. Supp. 523, 534 (E. D. Ill. 1941); *In re Local Union No. 550, United Brotherhood of Carpenters and Joiners of America*, 33 F. Supp. 544 (N. D. Cal. 1940); *United States v. Lumber Products Ass'n*, 42 F. Supp. 910, 916 (N. D. Cal. 1942); see also *People v. Reynolds*, 350 Ill. 11, 182 N. E. 754 (1932), *supra*, footnote 12. The same rule has been followed with respect to unincorporated associations other than labor unions. See *Davis v. Securities and Exchange Commission*, 109 F. (2d) 6, 8 (C. C. A. 7, 1940), certiorari denied, 309 U. S. 687; *United States v. Invader Oil Corporation*, 5 F. (2d) 715 (S. D. Cal. 1925). In the latter case, involving an unincorporated investment trust, the court said: "And the particular form of the organization, as being incorporated or not, seems to furnish no reason for extending the

privilege of the record keeper." Except for the opinion of the majority of the court below in the instant case, we know of no case in which an official of an unincorporated association has been held entitled to decline to obey a subpoena for the association's books and records on the ground that their production might tend to incriminate him.¹⁸

Nor is any such case cited by the respondent in his brief in opposition to the petition for certiorari. The respondent seeks to draw an implication of such a holding from *Brown v. United States*, 276 U. S. 134, 144; and from *Corretjer v. Draughon*, 88 F. (2d) 116, 118 (C. C. A. 1, 1937). However, in the *Brown* case, which upheld the validity of a subpoena duces tecum as against a claim that an unincorporated association was not liable to subpoena of its books and records, this Court expressly found it unnecessary to inquire whether "Brown's relation to the association or to the documents in question was such as to entitle him under any circumstances to assert the constitutional privilege" (p. 143), since the question was not adequately presented by the record. The Court noted that for all that appeared in the record it was entirely possible that the district court had disposed of the question of privilege after inspecting the documents and finding that they were not incriminating in character; and the Court pointed out further that if in fact the documents had not been produced by Brown for such inspection, "that alone would constitute a failure to show reasonable ground for his refusal to comply with the requirements of the subpoena." The mere application of the well-accepted rule that a witness may not in any event claim a privilege against self-incrimination in respect of documents without first producing the documents for inspection cannot, we submit, be erected into an implication that if the documents had been produced and found to be incriminating their use in evidence would have been privileged.

Corretjer v. Draughon, *supra*, in its holding merely followed the *Brown* case. In addition it contained a dictum to

Furthermore, the reasoning of those cases which have declined to accord the privilege to corporate officers in respect of corporate books is, we submit, equally applicable to the books of an unincorporated association. It is true that in *Hale v. Henkel*, 201 U. S. 43, and *Wilson v. United States*, 221 U. S. 361, much stress is laid upon the power of visitation retained by a state over corporations of its own creation. The asserted absence of any such visitatorial power over unincorporated labor unions was assigned by the court below as its principal ground for distinction of those cases. Yet in both *Hale v. Henkel* and *Wilson v. United States* the subpoena in respect of which the privilege was claimed and denied was a federal subpoena issued to secure the production of the books and records of a state corporation in connection with an investigation into alleged violations of federal law.¹⁹ The same was true in *Essgee Co. v. United States*, 262 U. S. 151, and *Wheeler v. United States*, 226 U. S. 478, in the latter of which the privilege was denied in respect of books which by virtue of the dissolution of the corporation

the effect that a particular political party—the Nationalist Party of Puerto Rico—might be sufficiently dissimilar to a corporation so as not to fall within the rule of *Wilson v. United States*, 221 U. S. 361.

¹⁹ This Court has likewise upheld the power of a state to compel the production of the books and records of a foreign corporation doing business in the state. *Consolidated Reading Co. v. Vermont*, 207 U. S. 541; *Hammond Packing Co. v. Arkansas*, 212 U. S. 322, 347-348.

were conceded to have become for ordinary purposes the property of the former officers. This Court in *Hale v. Henkel* explicitly disclaimed any intimation that the federal government "has a general visitatorial power over state corporations" (201 U. S. at p. 75). Rather the visitatorial power relied upon appears to be the power of "the General Government * * * to see that its own laws are respected * * *. The powers of the General Government in this particular in the vindication of its own laws, are the same as if the corporation had been created by an act of Congress". *Ibid.*

By this, we are of course not suggesting that the power of the federal government to seek the vindication of its own laws authorizes the compulsory production of any documents necessary to that end, regardless of claims of privilege. We do suggest, however, that since labor unions have been so extensively recognized in the law as artificial personalities distinct from the personalities of their members, a labor union official in possession of the union's records, whether or not he is a member of the union, falls within all the reason of the principle stated in *Wilson v. United States*:

The only question was whether as against the corporation the books were lawfully required in the administration of justice. When the appellant became president of the corporation and as such held and used its

books for the transaction of its business committed to his charge, he was at all times subject to its direction, and the books continuously remained under its control. If another took his place his custody would yield. He could assert no personal right to retain the corporate books against any demand of government which the corporation was bound to recognize (221 U. S. at p. 385).

In this very case, as pointed out above, at pp. 11-12, the court below has implicitly recognized the amenability of the union as such to a subpoena for its books and records. It follows, we believe, that the respondent, as the official in whose possession the books are found, has no greater right than a corporate official to interpose his own fear of personal incrimination as an obstacle to compliance with a subpoena legally directed to the union.

It should be recalled that the record does not disclose whether the respondent was the authorized custodian of the union's books and records, and the conclusion of the court below made this factor irrelevant, since the privilege was held to depend exclusively upon membership in the union. The subpoena was not directed to the respondent, and, for all that appears, the respondent may have possessed himself of the books and records solely for the purpose of attempting to frustrate the Government's demand for their production by the

union. The decision of the court below appears to lead to the conclusion that a labor union suspected of violation of federal law can insulate its records from inspection by placing them temporarily in the custody of a member who himself has reason to fear prosecution. We submit that no such result is required by the Fourth and Fifth Amendments to the Constitution.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court below should be reversed and the judgment of the district court should be affirmed.

✓ CHARLES FAHY,
Solicitor General.

✓ TOM C. CLARK,
Assistant Attorney General.

✓ CHESTER T. LANE,

✓ PHILIP MARCUS,
Special Assistants to the Attorney General.

✓ JESSE CLIMENKO,

✓ MALCOLM A. HOFFMANN,

✓ GEORGE M. FAY,

Attorneys.

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APPENDIX

Federal and State Action since 1922 Affecting Rights and Responsibilities of Labor Unions:

Federal Government action.

1. Exemption from income taxes. 26 U. S. C. § 101.

2. Under the National Labor Relations Act, 29 U. S. C. § 158, unions are protected against interference, restraint, or coercion by employers of labor. See *Edison Co. v. Labor Board*, 305 U. S. 197, 236: "The Act contemplates the making of contracts with labor organizations." By the same act, 29 U. S. C. § 159, a federal agency determines, in case of dispute, what union the employees have selected as their collective bargaining representative. Unions have been allowed to maintain actions for rights given under the Railway Labor Act, 45 U. S. C. § 151, e. g., *Virginian Ry. v. Federation*, 300 U. S. 515.

3. By the Norris-LaGuardia Act, 29 U. S. C. § 103, anti-union contracts are declared to be contrary to the public policy of the United States and denied enforcement in any court of the United States.

4. The Anti-Racketeering Act, 18 U. S. C. § 420 (d), provides that the Act shall not be applied so as to diminish or affect in any manner the rights of bona fide labor unions in lawfully carrying out their legitimate objects.

5. Collective bargaining provided for under Railway Labor Act, 45 U. S. C. § 152.

6. Unions given right to go into bankruptcy. 11 U. S. C. § 1 (8).

7. Right of employees of a debtor in bankruptcy to join a union protected. 11 U. S. C. § 672.

8. Right of labor union to be heard on economic soundness of plan for corporate reorganization provided for. 11 U. S. C. § 606.

9. "Suitable employment" defined in Railroad Unemployment Insurance Act so as to protect the strength of the union and its appeal to members. 45 U. S. C. § 354 (c). Unions are considered employers for the purpose of this Act, 45 U. S. C. § 351.

10. War Labor Board approves union maintenance contracts and has required them in a number of cases, e. g., 5 War Lab. Rep. 1, 26.

11. Workers for PWA projects secured through local employment agencies but union members secured through unions. *Handbook of Federal Labor Legislation*, Bulletin No. 39, Part I, p. 50.

12. PWA workers may unionize and collectively bargain. *Ibid.*

13. Unionization approved for WPA workers. *Ibid.*, p. 73.

14. Trade-mark status given to union label by patent office on theory union is a juristic person. See (1942) 10 L. R. R. 635.

15. Section 9 of the War Labor Disputes Act of June 25, 1943 (Pub. L. No. 89, 78th Cong.) prohibits labor unions from making contributions in connection with any election of a member of Congress or in connection with any presidential election.

16. Union security provisions suspended by War Labor Board for unauthorized strikes, 5 War Lab. Rep. 47.

State Government action.

1. Employer cannot discharge or refuse to hire employee because of union affiliation. 12 States with legislation to this effect are named in Smith and DeLancey, *The State Legislatures and Unionism*, (1940) 38 Mich. L. Rev. 987, 996, fn. 29.

2. Unions encouraged through collective bargaining provisions in state labor relations acts. Massachusetts, Michigan, Minnesota, New York, Pennsylvania, Utah, and Wisconsin are stated to have such acts. Smith and DeLancey, *supra*, p. 996. Additional states are: California, *Calif. Labor Code* (Deering 1941 Supp.), Div. 2, Pt. 3, Sec. 1126; Colorado, *Colo. Session Laws 1943*, Ch. 131, Sec. 6; Rhode Island, *Pub. Laws of R. I. 1941-1942*, Chs. 1066, 1247; see also Maine, *Me. Laws 1941*, Ch. 292.

3. Written contracts between labor unions and employers providing for arbitration enforceable at law. N. Y. *Civil Practice Act*, Sec. 1448.

4. Representation on state apprenticeship councils. *Mont. Laws 1941*, Ch. 149; *Ore. Laws 1943*, Ch. 457, Sec. 7; N. Y. *Executive Law* (McKinney's), Art. 12-A.

5. Labor unions given special privileges with respect to disability and life insurance transactions, *Calif. Stats. and Amendments to Codes 1941*, Ch. 1060, Sec. 2.

6. Employers to recognize employee's assignments of percent of wages to unions, *Utah Code Ann.* (1943), 49-14-1.

7. Labor unions expressly made subject to unfair labor practice provisions in state labor relations laws in Massachusetts, Michigan, Minnesota, Pennsylvania, and Wisconsin. See Unković, *The Pennsyl-*

vania Labor Relations Act (1939), 44 Dick. L. Rev. 16, 20-21. In *Christoffel v. Wisconsin Employment R. Board*, 10 N. W. (2d) 197 (Wis. 1943), a finding by the state labor board of unfair labor practices by a union was sustained.

8. Registration required. See discussion of Kansas, Minnesota, Utah, and Wisconsin laws in 2 Teller, *Labor Disputes and Collective Bargaining* (1940), Sec. 466. To the statutes there mentioned should be added *Kans. Laws, 1943*, Ch. 191; *Texas Session Laws 1943*, Ch. 104, Sec. 5.

9. Labor unions denied the benefit of the anti-injunction statute where they coerce an employer to violate the state or National Labor Relations Act. 43 *Pa. Stats.* (Purdon), § 206d (c).

10. Labor unions prohibited from, or penalized for, denying membership or equal treatment to members on account of race, color, or creed: *Kans. Gen. Stats.* (Corrick, 1941 Supp.), 44-801; *Neb. Compiled Stats.* (1941 Supp.), 48-801; *N. Y. Civil Rights Law* (McKinney's), 43; 43 *Pa. Stats.* (Purdon), 211.3 (f. Cf. *Ala. General Acts, 1943*, No. 298, Sec. 8; *Wis. Statutes, 1941*, Sec. 111.06. See Witmer, *Civil Liberties and The Trade Union*, (1941) 50 *Yale L. J.* 621, 625, fn. 15, 16, for reference to a similar attitude by some courts, the Restatement of Torts and foreign legislation. See also Order of the President's Fair Employment Practice Committee, 12 *U. S. L. Week* (Sec. 2) 2293.

11. Arkansas requires persons soliciting advertising for labor organizations to file a bond with the Secretary of State. *Ark. Stats.* (Pope Supp. 1942), p. 464.

12. Georgia prohibits strikes, slowdowns or stoppage by labor unions, with certain

exceptions, prior to a 30-day notice to the employer. 16 *Ga. Code Ann.*, Ch. 54-7.

13. Colorado, *Colo. Session Laws*, 1943, Ch. 131, Sec. 20 (1); Florida, *Fla. Laws* 1943, c. 21968, § 6; Idaho, *Ida. Session Laws* 1943, Ch. 76, Sec. 1; Kansas, *Kans. Laws* 1943, Ch. 191, § 5; South Dakota, *S. D. Session Laws* 1943, Ch. 86, Sec. 1; Texas, *Texas Session Laws* 1943, Ch. 104, Sec. 3; and Utah, *Utah Code Ann.* (1943), 49-13, require annual reports to be made to the Secretary of State.

14. Florida, *Fla. Laws* 1943, c. 21968, § 9; Massachusetts, *Mass. Gen. Laws*, Ch. 150A, Sec. 4A; and Oregon, *Ore. Laws* 1939, Ch. 2, proscribe specified unfair labor practices by unions.

15. Business agents of unions are required to obtain an annual license from the Secretary of State in Florida, *Fla. Laws* 1943, c. 21968, § 4, and Kansas, *Kans. Laws* 1943, Ch. 191, § 3. In Texas paid union organizers must register with the Secretary of State. *Texas Session Laws* 1943, Ch. 104, Sec. 5. Upheld in *Ex Parte Thomas*, 174 S. W. (2d) 958 (Tex. Sup. Ct., 1943).

16. Florida, *Fla. Laws* 1943, c. 21968, § 7; Oregon, *Ore. Laws* 1939, Ch. 2; and Texas, *Texas Session Laws* 1943, Ch. 104, Sec. 9, require unions to keep accurate books of account open to the inspection of their members. Minnesota requires financial reports to be made to members, *Minn. Laws* 1943, Ch. 625, Sec. 4, as does Wisconsin, *Wis. Statutes*, 1941, sec. 111.08.

17. Idaho, *Ida. Session Laws* 1943, Ch. 76, Secs. 2-4, and South Dakota, *S. D. Session Laws* 1943, Ch. 86, Secs. 2-3, restrict labor union activities in connection with farm labor.

18. Election of officers provided for and method prescribed, *Colo. Session Laws 1943*, Ch. 131, Sec. 20 (4) (a) (b); *Minnesota Labor Union Democracy Act*, *Minn. Laws 1943*, Ch. 625, Secs. 2, 3; *Texas Session Laws 1943*, Ch. 104, Sec. 4.

19. Written appointment of officer or agent to represent members of union in collective bargaining to be made a permanent record of the union, *Kans. Stats. Ann.* (1935), 44-614.

20. Political contributions forbidden *Colo. Session Laws 1943*, Ch. 131, Sec. 20 (4) (c); *Texas Session Laws 1943*, Ch. 104, Sec. 4b.

21. In Texas copies of working agreements with employers containing check-off clauses have to be filed with the Secretary of State and are to be open to grand juries, judicial and quasi-judicial inquiries, *Texas Session Laws 1943*, Ch. 104, Sec. 6.

22. Excessive initiation fees forbidden, *Texas Session Laws 1943*, Ch. 104, Sec. 7.

23. Advance fees restricted, *Texas Session Laws 1943*, Ch. 104, Sec. 8.

24. Taking money for permission to work prohibited, *Texas Session Laws 1943*, Ch. 104, Sec. 8a.

25. Books open to Industrial Commission of Colorado, *Colo. Session Laws 1943*, Ch. 131, Sec. 20 (4) (d). In Texas they are open to enforcement officers upon approval of Attorney General, and are open to "grand juries and judicial and quasi-judicial inquiries in legal proceedings," *Texas Session Laws 1943*, Ch. 104, Sec. 9.

NOTE.—Section 20 of Chapter 131 of the *Colo. Session Laws 1943* is premised on the assumption that compulsory incorporation has taken place.